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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 15, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Federal-State Joint
Board on Universal Service
CC Docket No. 96-45, CC Docket
No. 97-160; DA 98-715

Dear Ms. Salas:

Enclosed are the original and five copies of the Maryland Public Service Commission's Initial Comments to be filed in the above-captioned proceedings.

If you have any questions, please do not hesitate to contact me at (410) 767-8039. Thank you for your prompt attention to this matter.

Sincerely,

Susan Stevens Miller

Susan Stevens Miller
Assistant General Counsel

amn
Enclosures
cc: International Transcription Service

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF	*	
FEDERAL-STATE JOINT BOARD		CC DOCKET NO. 96-45
ON UNIVERSAL SERVICE	*	
	*	CC DOCKET NO. 97-160
FORWARD-LOOKING MECHANISM		
FOR HIGH COST SUPPORT	*	DA 98-715

INITIAL COMMENTS OF THE
MARYLAND PUBLIC SERVICE COMMISSION

I. INTRODUCTION

On April 15, 1998, the Common Carrier Bureau ("CCB") of the Federal Communications Commission ("FCC" or "Commission") released a Public Notice (DA 98-715) seeking additional proposals for modifying the Commission's methodology for determining universal service support. The CCB also requested that interested parties comment on these proposals. In response to this Public Notice, the Maryland Public Service Commission ("MDPSC") submits the following initial comments.

Various proposals for a new federal high cost fund were submitted in this docket. The MDPSC believes that any proposal adopted by the FCC should:

> (1) Cap the size of the new federal high cost fund at the size of the existing high cost programs[1];

[1] The existing high cost programs total funding is approximately $1,723,600,000. This figure includes the old federal high cost fund ($825,700,000), weighted dial equipment minutes ($426,800,000) and long term supported ($471,100,000).

(2) Use proxy models and/or embedded costs only to identify high costs areas and determine where federal support should be provided, not to determine the size of the fund;

(3) Include a surcharge based on interstate revenues as a means to recover the cost of the new federal high cost fund; and

(4) Treat all telecommunications carriers providing supported telecommunications services equally regardless of size.

The MDPSC will comment briefly on the proposals of the Ad Hoc Working Group (Ad Hoc), the Telecommunications Industry Analysis Project (TIAP), U.S. West Communications, Inc. (U.S. West), GTE Service Corporation (GTE) and Bell South Corporation (Bell South). In reviewing the proposals presented by the various parties, the MDPSC has determined that the Ad Hoc proposal, amended to meet the requirements set forth in these comments, represents an acceptable alternative.[2]

II. BACKGROUND

On February 8, 1996, the Telecommunications Act of 1996 ("1996 Act") was signed into law by President Clinton. Section 254 of the 1996 Act requires the FCC, and permits state commissions, to establish a mechanism to maintain universal telephone service. At least three kinds of support are specifically enumerated in the 1996 Act: support for high cost areas; support for schools, libraries and rural health care providers; and support for low-income customers.

[2] While advocates of the Ad Hoc proposal contend that it is a compromise among the interests of the low and high cost states, some "low cost" states clearly fair much better under the proposal as submitted to the FCC. For example, Maryland's contribution is projected to increase by 60%, while New York's contribution would remain constant. The burden of these subsidies should not be imposed on just a few states.

In Section 254, the 1996 Act provides a specific mandate to the FCC to institute a Joint Board to recommend procedures for the 1996 Act's various principles regarding universal service. Pursuant to the mandates contained in the 1996 Act, the FCC issued a Notice of Proposed Rulemaking ("NPRM") on March 8, 1996. The NPRM established a Joint Board and requested comment on the implementation of various provisions of Section 254.

On November 8, 1996, the Federal State Joint Board adopted a Recommended Decision regarding universal service. In the Recommended Decision, the Joint Board made numerous recommendations on universal service issues. In addition, the Joint Board recommended that the FCC specifically seek additional information on a number of topics. On November 18, 1996, the CCB issued a public notice seeking comment on the Recommended Decision.

On May 8, 1997, the FCC issued its Universal Service Order[3]. In this Order, the FCC adopted a fourstep methodology for determining the appropriate level of federal universal service support that non-rural carriers receive. The Commission determined that non-rural carriers servicing rural, insular and high cost areas (collectively referred to as "high cost areas") would receive support based on forward-looking economic cost beginning January 1, 1999, while rural carriers serving high cost areas would move to a forward-looking methodology no sooner than January 1, 2001.

[3] Federal State Joint Board on Universal Service, Report & Order, CC Docket No. 96-45, 12 FCC Rcd. 8776 (1997), appeal pending Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir.)

The Commission also determined that it would assess and permit recovery of contributions to high cost support mechanisms based only on interstate revenues because such an approach would continue the historical method for recovering universal support contributions and promote comity between the federal and state governments.[4] Thus, the FCC concluded that carriers may recover their contributions through interstate access and interexchange revenues.[5]

III. ARGUMENT

A) THE FCC SHOULD CAP THE SIZE OF THE NEW FEDERAL HIGH COST FUND.

The MDPSC believes that the new federal high cost should be capped at the current level of interstate subsidy. Statistics concerning communications common carriers released by the FCC reveal that the nationwide telephone penetration level of households is 93.9%, with an average residential rate for unlimited calling of $13.70, excluding a $3.54 subscriber line charge.

While Maryland's penetration level (97.3%) exceeds the nationwide average, the rate for unlimited residential service is approximately $16.50, excluding the $3.50 federal subscriber line charge. Thus, Maryland's local rates already are considerably above the nationwide average. Maryland ratepayers should not be required to subsidize local rates in other states that are below the nation's average. Given that

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[4] Universal Service Order, 12 FCC Rcd. at 9198-9203, paras. 824-836.
[5] Id., 12 FCC Rcd. at 9199-9200, paras. 829-830.

universal service is achieved nationwide with the current level of federal universal service funding, a cap on the new federal high cost fund is reasonable.[6]

Maryland does not have the excess financial resources to subsidize telecommunications providers in other states. Data from 1990 prepared by the Maryland Office of Planning shows that 15 percent of households in Maryland have incomes of less than $14,999. For Baltimore City, that percentage increases to 33 percent. While Maryland has one of the highest penetration levels in the nation, a county analysis shows an 8.9 percent differential between the county with the highest penetration level and the county with the lowest level. Maryland has specific universal service funding needs that cannot be met if excessive revenues are used to fund out-of-state providers provision of basic telephone service.

The TIAP and Ad Hoc papers both identify the costs of the existing federal high cost programs.[7] The TIAP paper identifies the cost of the 1998 federal high cost fund at $1,723,600,000. The cost consists of the old federal high cost fund ($825,700,000), weighted dial equipment minutes ($426,800,000), and long term support ($471,100,000) for non-rural and rural telecommunications carriers.[8] Thus, the new federal high cost fund should be capped at no greater than $1,723,600,000.

The Ad Hoc paper shows that under existing programs, Maryland contributed $25,700,000 to the federal high cost fund. The Ad Hoc paper does not include the additional $10,000,000 that Maryland contributed via the long term support programs.

[6] A cap on the new federal high cost fund will have the added benefit of encouraging carriers to operate more efficiently by limiting the amount of available support.
[7] This information is provided for comparison purposes and is not a part of either proposal.
[8] The Ad Hoc paper shows that existing high cost support is $1,243,000,000, which includes the old federal high cost fund and weighted dial equipment minutes.

Since universal service already is achieved nationwide, Maryland ratepayers should not be required to contribute additional funds for an explicit interstate subsidy program.[9]

B) THE FCC SHOULD USE PROXY MODELS ONLY FOR THE IDENTIFICATION OF HIGH COST AREAS.

In the Universal Service Order, the FCC adopted a four-step methodology for determining the appropriate level of federal universal service support that non-rural carriers will receive beginning January 1, 1999. This four-step methodology begins with the determination of costs based on a forward-looking economic cost model. The second step requires the determination by the FCC of a nationwide revenue benchmark. In the third step, the difference between the cost of universal service and the benchmark is calculated. Federal support for universal service is then determined in the fourth step by taking 25 percent of the difference between universal service costs and the benchmark.

Some of the proposals submitted to the FCC depend on the selection of a cost model platform, inputs, aggregation levels and benchmarks to determine the size of the new federal high cost fund. However, the size of the new federal costs fund can be determined before the FCC selects a cost model platform and establishes inputs and aggregation levels. There is no need to determine a revenue or cost benchmark,

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[9] As the Senate Commerce Committee found, the 1996 Act neither requires nor contemplates that the FCC will adopt a program which requires the level of high cost universal service support to become more expensive and burdensome to unsubsidized ratepayers than it is today. Sen. Rep. No. 104-23, 104th Cong., 1st Sess., 25-26 (1995).

nor is there any need to adopt U.S. West's proposal for additional benchmarks to determine the size of the fund.

The new federal high cost fund should be capped at the existing high cost programs funding level. This proposed cap is slightly less than the Ad Hoc's projected estimate of $1,826,000,000. A cost model platform and/or embedded costs should be used only to identify the locations of high cost areas nationwide and to ensure the appropriate allocation of high cost funds but not to determine the size of the fund.

C) THE FCC SHOULD PERMIT A SURCHARGE ONLY ON INTERSTATE REVENUES.

The purpose of the federal high cost fund is to provide a transfer of revenues (subsidy) from "low cost" states to high cost states. The interstate distribution should be funded by a surcharge only on interstate revenues. States should retain the option of imposing a surcharge only on intrastate revenues to fund state universal service programs.

The FCC discussed the scope of its authority in its Universal Service Order, stating:

> . . . Though Section 254 grants the Commission the authority to assess contributions for rural, insular, and high cost areas and low income consumers from intrastate as well as interstate revenues and to require carriers to seek authority from states to recover a portion of the contribution in intrastate rates, we decline to exercises the full extent of our authority . . . .[10]

[10] Universal Service Order, at para. 807.

The FCC specifically stated that this decision was "intended to promote comity between the federal and state governments and is based on [the FCC's] respect for the states' historical expertise in providing universal service."[11] The FCC determined that it should maintain the traditional method of providing for recovery, which permits carriers to recover their federal universal service contributions through rates for interstate services only. The FCC found that this approach would best promote the continued affordability of basic residential service.[12]

Nothing has occurred in the ensuing twelve months which should cause the FCC to reconsider its decision that contributions for the high cost fund should be recovered solely through rates for interstate services. This method of recovery still is the only option which would promote the continued affordability of basic residential service. More importantly, the FCC's conclusion that the Commission has authority to assess contributions from intrastate revenues is incorrect and contrary to law. To the extent that a carrier's contribution would be based on intrastate revenues, this charge would effectively change intrastate rates without authority and obliterate the line between state and federal jurisdiction created by 47 U.S.C. §152(b).

States exercise exclusive jurisdiction over intrastate rates. Section 2(b) of the Communications Act of 1934 ("1934 Act") (47 U.S.C. §152(b)) creates a system of dual federal-state regulation for telecommunications. Section 2(b), as well as Sections 254 and 601(c) of the 1996 Act, all support the conclusion that the FCC lacks the authority to base contributions to the federal universal service fund on intrastate revenues. The intrastate exception to the FCC's authority was not altered by

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[11] Id.

[12] Id. at para 809.

the 1996 Act. Section 2(b) of the 1934 Act still provides an express limitation on the FCC's jurisdiction. By its terms, this provision removes intrastate matters from the FCC's reach, resulting in the dual regulatory system we know today.

The Supreme Court has explained that by this section, the Communications Act "not only imposes jurisdictional limits on the power of a federal agency, but also . . . provides its own rule of statutory construction." Louisiana PSC v. FCC, 476 U.S. 355, 377 n.5 (1986). By "fencing off" regulation of intrastate matters, Section 2(b) establishes the Communication Act's dual regulatory system for telecommunications. While there are exceptions to Section 2(b)'s jurisdictional limitations, these exceptions are explicit. Section 254 is not included in this limited group of exceptions and nothing in the 1934 Act nor the 1996 Act exempts Section 254 from the operation of Section 2(b). Thus, the statutory prohibition against the FCC's exercise of jurisdiction over intrastate communications is applicable to Section 254.

In the Louisiana case, the Supreme Court held that the specific limitations on the FCC's jurisdiction contained in Section 2(b) supersede other parts of the Communications Act which may confer undifferentiated grants of substantive authority on the FCC. In Louisiana, the FCC argued that it could require the states to follow federal depreciation rules for purposes of intrastate ratemaking because Section 220 authorized the Commission to set depreciation rates and did not expressly prohibit the application of such rates to intrastate pricing.

The Supreme Court reached a contrary result, ruling that the FCC was powerless to extend its rules into the intrastate context. Specifically, the Supreme Court stated:

> While it is, no doubt, possible to find some support in the broad language of the [depreciation provision] for [the FCC's] position, we do not find the meaning of the section so unambiguous or straight forward as to override the command of Section 152(b) that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction" over intrastate service. Louisiana, at 377.

Thus, the Supreme Court held that the FCC could not take action to advance a broad federal policy where the effect of this action is to disregard Section 2(b)'s express jurisdictional limitation. Id., at 374-375.

The analogy of the Louisiana case to the present situation could not be more clear. Just as Section 220's general grant of authority over depreciation rates did not empower the FCC to regulate intrastate aspects of depreciation, Section 254's authorization to establish a universal service fund does not permit the FCC to assert jurisdiction over intrastate revenues in implementing that fund. Under Louisiana, it is irrelevant that Section 254 does not by its terms forbid the FCC from exercising authority over matters relating to intrastate service.

Nothing in the 1996 Act supports the conclusion that the FCC has authority to utilize intrastate revenues in determining a carrier's contribution to the federal universal service fund. To the contrary, Section 254 simply replicates the general scheme of the dual regulatory system that characterizes the Communications Act as a whole. The 1996 Act reinforces this dual system, it does not negate it. In the present situation, Congress simply has not granted the FCC authority to use intrastate revenues to fund federal universal service programs.

Section 254 itself supports the conclusion that the FCC lacks jurisdiction to assess intrastate revenues. The structure of this section actually prohibits the FCC's use of intrastate revenues. The 1996 Act requires that funding for the federal program be derived from "every telecommunications carrier that provides interstate service." 47 U.S.C. §254(d) (Emphasis Added). This provision authorizes the FCC to establish a federal universal service fund subsidized by interstate carriers only. Further support for this interpretation is found in the contrasting language relating to state universal service programs. Section 254(f) carefully preserves state authority to create support mechanisms not inconsistent with any federal program and leaves to the states the regulation of intrastate carriers.

When these requirements are read together, it is clear that Congress intended the specific reference to interstate carriers to mean a distinction should be made for a separate federal support mechanism. Both the language and the structure of Sections 254(d) and 254(f) indicate that Congress intended both the federal and state governments to have complimentary, but separate, roles in providing universal service.

Congress had made it clear that there is a distinction between the federal and state universal service programs. Thus, this same distinction should follow the contributions for these programs. The authority to utilize intrastate revenues as a base for contributions rests solely with the individual state commissions. Section 254(f) anticipates the state universal service programs should complement the federal program, not compete with it. Only interstate revenues should be utilized for funding federal universal service programs, allowing intrastate telecommunications revenues to be used for funding the complementary state universal service programs.

Congress clearly intended the 1996 Act to preserve state authority over universal service matters within the state. Utilizing intrastate revenues to fund the federal universal service programs will negatively impact state programs. Applying a federal assessment to intrastate revenues will unfairly shift most of the burden of funding interstate universal service to local telephone rates. State commissions should not be hindered in developing their own viable state programs. Therefore, intrastate revenues should not be assessed, as such revenues are designed for complementary state universal service programs, not the federal fund. By assessing only interstate revenues, the FCC would preserve the authority of the states to fund state universal service objections through a separate assessment or intrastate telecommunications revenues.

D) THE FCC SHOULD ABANDON THE DISTINCTION BETWEEN RURAL AND NON-RURAL CARRIERS.

The current definition of rural companies as companies with a total of 100,000 access lines or less is not required for a forward-looking universal service mechanism. The MDPSC concurs with the Ad Hoc proposals' suggestion that all carriers providing supported services should be treated equally. There is no economic justification for providing small carriers a greater level of support than larger carriers. Under the current definition, a new entrant or incumbent company serving less than

100,000 lines will qualify as a rural carrier regardless of the financial size of the company. The size of the fund should be independent of the classification of carriers receiving the funds. Subsidy flows should be directed to the areas where support is needed regardless of the size of the carrier providing the supported service.

IV. CONCLUSION

The MDPSC fully recognizes and supports the public policy goals of universal service. The MDPSC believes that continued Federal-State cooperation is essential to ensure that all markets and subscribers receive the benefits of competition.

The MDPSC looks forward to continuing to work with the FCC to ensure that out mutual goal of universal service is achieved. For the foregoing reasons, the MDPSC respectfully requests that the FCC incorporate into the final rule issued in this proceeding the positions and suggestions discussed in these comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Initial Comments of the Maryland Public Service Commission were served on the parties listed on the attached service list by first class, postage prepaid mail.

Susan Stevens Miller

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Assistant General Counsel
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APPENDIX
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